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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 226

ROMAN MONTOYA,

Petitioner,

vs.

TIDE WATER ASSOCIATED OIL COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Roman Montoya, respectfully shows to this Honorable Court:

I

Summary Statement of Matter Involved

Your petitioner seeks review of a decision of the Court of Appeals for the Second Circuit affirming [1] the judgment entered in the United States District Court for the Southern District of New York dismissing petitioner's complaint after trial.

The suit presents several issues of fundamental importance to merchant seamen involving the legality of certain Decisions of the Maritime War Emergency Board relating to the rights of merchant seamen who became prisoners of war; the violation of basic sections of the Seamen's act of 1872, 46 U.S.C.A. 564, 565, 600, 626, 627 governing the requirements of shipping articles, the pro-

[1] Judge Frank dissented.

tection of seamen's wages and the disposition of the effects of deceased seamen; and the obligation of a shipowner to pay wages to a living seaman, after the shipowner has had the seaman declared presumptively dead and his wages have been paid over and distributed through administration to next of kin.

Petitioner signed shipping articles for a foreign voyage on respondent's tanker "S.S. William F. Humphrey" which left New York on March 4, 1942 and was sunk on July 16, 1942 by a German raider in the Pacific. He was taken prisoner by the Germans who turned him over to the Japanese who interned him on land from November 1, 1942 until he was liberated by the Americans on August 15, 1945, and repatriated on September 18, 1945.

The first page of the shipping articles contained a rider declaring certain decisions of the Maritime War Emergency Board to be applicable.[2] Exercising the option granted by Decision No. 5, the respondent on September 17, 1942 requested and on November 19, 1942 the Maritime War Emergency Board issued a certificate of the presumptive death of petitioner.[3] Whereupon respondent deposited with the Shipping Commissioner in New York the sum of $1,248.07 due the petitioner at the time of his presumed death. The Shipping Commissioner in turn deposited this sum with the United States District Court for the Southern District of New York. Thereafter the money was paid to the administrator of petitioner's estate who had been appointed by a Court in Louisiana. By the time petitioner

[2] The rider stated that Maritime War Emergency Board Decisions No. 1, dated December 22, 1941; No. 2 with attachments 1, 2, and 3, dated January 10, 1942; No. 3 dated January 20, 1942; No. 4 dated January 22, 1942; No. 5 revised February 21, 1942; and No. 6 dated February 24, 1942, were applicable.

[3] It should be noted that respondent requested that petitioner should be declared presumptively dead, only two months after the vessel was lost, and that the Board acted on this request without even waiting what would normally appear to be a reasonable period, in view of the difficulties of communication existing due to war conditions.

was repatriated, the administrator had disposed of the money in such a way that it was lost to the petitioner. Upon his repatriation the Maritime War Emergency Board corrected its certificate of presumptive death and deleted petitioner's name therefrom. Petitioner's demand that respondent pay him his earned wages was rejected because of respondent's prior payment of wages to the Shipping Commissioner.

The text of the Decisions of the Maritime War Emergency Board referred to in the rider attached to the first page of the shipping articles, was not set forth, but was incorporated therein by reference. This was in violation of 46 U. S. C. A. 564, Section 8.

The Court found as a fact that petitioner was never shown the first page of the shipping articles, nor were the articles and the text of the Maritime War Emergency Board Decisions read to him. He did not know, therefore, that he was to be bound by these Decisions. When he signed the articles, a matter of no more than a minute, the front page of the articles was covered and was lying face downwards on the table. The failure to show or acquaint petitioner with the contents of the articles was in violation of 46 U. S. C. A. 565.

The signing on was superintended by two of the ship's officers and by the United States Shipping Commissioner. The Shipping Commissioner, in the presence of these two officers, told petitioner the amount of his wages, and also that he would receive his wages plus a monthly bonus of $100 until he would be returned to New York.[4] This was in fact a misrepresentation of the articles. They contained no such obligation and Decision No. 5 (incorporated by reference) appears to have provided, albeit in rather ambiguous language, that in the event of capture or internment of a seaman the liability of the shipowner was limited solely to the payment of wages.

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[4] This was found as a fact by the Trial Court (R. 134).

Upon his repatriation, petitioner was paid an amount equivalent to his base wages for the period of his internment. He was refused, however, the additional monthly bonus of $100, for the same period, because of Decision No. 5 of the Maritime War Emergency Board, which had been incorporated by reference in the shipping articles.

Suit was filed to recover:

1. Wages in the sum of $1,248.07. This sum represented earnings from March 4, 1942 to July 16, 1942 (when petitioner became a prisoner of war), and Maritime War Emergency Board "benefits" from July 17, 1942 to November 19, 1942 (when petitioner was declared presumptively dead).

2. Double wages pursuant to 46 U. S. C. A. 596-7 for failure to pay petitioner's earned wages after his repatriation to the United States.

3. War bonus at $100 per month, for the period petitioner was interned ashore as a prisoner of war, from November 2, 1942 to September 7, 1945, amounting to $3,400 (either on *quantum meruit* under 46 U. S. C. § 575, or based on the oral representation of the Shipping Commissioner, in the presence of the ship's officers, that this was one of the terms and conditions of his employment).[5]

The opinion of the United States District Court is reported in 79 F. Supp. 677 (R. 36).

The opinion of the Court of Appeals is reported in 174 F. (2d) 607 (R. —).

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[5] There were also alleged additional claims for "service record compensation" at the rate of 10% of base pay amounting to $266., and "vacation pay" at the rate of 21 days per year amounting to $222.39, from the date of the loss of the vessel (July 17, 1942) until petitioner's repatriation (September 18, 1945). Petitioner contends that he continued as an employee in the service of the respondent during his internment, and was entitled to these additional items pursuant to the collective bargaining agreement covering his employment.

II

The jurisdiction of this Court rests on Title 28, U. S. C. A. Section 1254(1) and 2101(c) eff. September 1, 1948.

The decision of the Court of Appeals in the instant case was rendered on May 5, 1949 and the mandate was entered on June 20, 1949.

III

Questions Presented

1. Where a seaman is taken as a prisoner of war, and declared presumptively dead, does he lose his right to recover his earned wages, if the employer has deposited them with the Shipping Commissioner, and the wages have eventually been distributed through administration to the seaman's next of kin, and spent in the mistaken belief that the seaman was dead?

2. In light of 46 U. S. C. A. 600 which provides that a seaman may not, even in writing, waive any right to wages and which specifically provides that "* * * every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship * * * shall be wholly inoperative", could petitioner validly have consented to the forfeiture of his earned wages and the payment thereof to next of kin, in the event he was declared presumptively dead pursuant to the provisions of Decision No. 5 of the Maritime War Emergency Board?

(Did the Maritime War Emergency Board, an agency created pursuant to voluntary agreement between shipowners and maritime labor organizations, and without legislative or executive authorization, have the power to promulgate Decision No. 5 and make it binding upon petitioner in view of 46 U. S. C. A. 600?)

3. Where a seaman's knowledge of English is limited, and he has never been made aware that he was bound by the Decisions of the Maritime War Emergency Board, although the front page of the shipping articles recited that certain of those Decisions would be applicable, and where the text of

the applicable Maritime War Emergency Board Decisions is not annexed to the shipping articles, to what extent, if at all, is the seaman bound by such Decisions—taking into consideration that there existed statutes (46 U. S. C. A. 564-565) which provide that the terms of the seaman's employment are to be set forth in the articles, and are to be made known to him?

4. Where a seaman, engaged during a war period, has been told by the Shipping Commissioner, in the presence of the ship's officers, at the time of signing shipping articles, that he will receive a bonus of $100 monthly, until he is returned to the United States, and he is then taken as a prisoner of war by the enemy, does the right of bonus continue during the period of his internment on land, until his repatriation, or is the bonus for that period to be denied, because the Maritime War Emergency Board has ruled, without the seaman's knowledge, and contrary to what he was told when he was signed on, that this bonus shall not apply while the men are prisoners on land?

5. Is a seaman entitled to war bonus payments during a period of internment on land, as a prisoner of war, when the union which is his collective bargaining agent has negotiated an agreement under which no arrangements were made for such bonus payments, but where the employer nevertheless entered into a personal employment contract with the seaman himself, under which the latter had the right to rely upon a Shipping Commissioner's representation, (made in the presence of the ship's officers assigned by the master to superintend the signing-on of the crew) that the war bonus would be paid under such circumstances, and that such provision was contained in the shipping articles?

IV

Reasons for Allowance of Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

1. From the very inception of this case, petitioner has relied upon *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108 (1894) as authority for the proposition that payment of money to a creditor's administrator, under the erroneous belief that the creditor is dead, does not extinguish the indebtedness, if it subsequently turns out that the man is alive.

This case has been cited with approval time and time again and it has been firmly established law since at least 1894.

The respondent has scrupulously avoided a discussion of this authority and, surprisingly, so did Judge Bondy and the Judges of the Court of Appeals.

It is respectfully submitted that petitioner's right to his earned wages is supported squarely by the holding of the *Scott* case, and that the denial of this claim would constitute deprivation of property without due process of law. (*Scott* v. *McNeal, supra,* p. 1114).

Especially would there appear to be a denial of due process in view of the unreasonable haste with which respondent and the Maritime War Emergency Board acted, in having petitioner declared presumptively dead, before there was even an adequate opportunity to learn whether he was, in fact, a survivor; and where there was no showing that they attempted any investigation to ascertain the true facts, before proceeding to dispose of his earned wages as though he were dead.

2. The Courts below were both of the opinion that when petitioner signed the shipping articles, incorporating by reference Decision No. 5 of the Maritime War Emergency Board, he agreed that he might be declared presumptively dead and that he was therefore bound by the administrative disposition made of his wages in accordance with 46 U. S. C. A. 626, 627. Neither Court, apparently, was persuaded by petitioner's contention that the disposition of a seaman's assets pursuant to 46 U. S. C. A. 626, 627, could

be binding only if the seaman were, in fact, dead and that such disposition was rendered nugatory if, in fact, the seaman was alive.

Neither, were the Courts below impressed by the argument that 46 U. S. C. A. 600 precluded the petitioner from consenting to be declared presumptively dead, if the effect of such consent was to work a forfeiture of his earned wages. If petitioner is correct in this latter contention, Decision No. 5 as construed and applied by the Courts below was in derogation of 46 U. S. C. A. 600 and petitioner's alleged consent to be declared presumptively dead was "wholly inoperative."

So far as our research discloses this is a case of first impression with respect to the consequences following the administration and distribution of a seaman's money pursuant to 46 U. S. C. A. 626 and 627 when, in fact, the seaman was alive at the time of distribution.

It is also a case of first impression with respect to the applicability of 46 U. S. C. A. 600 to a seaman's agreement to be declared presumptively dead.

3. In the instant case, petitioner was unable to read English with any facility. He did not read the articles. The Shipping Commissioner, so the Trial Judge found, "told him that he would receive a one-hundred dollars bonus until he returned to New York." The articles, and the Decisions incorporated by reference, did not so provide.

Petitioner has asserted that the circumstances under which he signed the shipping articles were in violation of (a) 46 U. S. C. A. 564, under which it is provided that the terms of a seaman's employment are to be set forth in the articles, including the amount of wages which each seaman is to receive, and (b) 46 U. S. C. A. 565 under which it is provided that the articles must be signed before a Shipping Commissioner who must make the contents thereof known to the seaman.

Accordingly, petitioner has contended that he was not bound by the Decisions of the Maritime War Emergency Board, since, otherwise, the effect of such Decisions would amount to a repealer of statutes enacted by Congress for the protection of seamen.

Judge Frank in his dissenting opinion upheld the petitioner. "In those circumstances, I think the authorities require us to hold that the articles did not bind the appellant, that as a result, no contract resulted from his signing them, and that he is entitled to recover in *quantum meruit*," 174 F. (2d) 607, 610-611.

Whether, as Judge Frank suggested, "no contract resulted," or, whether, as petitioner has contended, the Decisions of the Maritime War Emergency Board were not binding upon him, in any event, an important question is presented with respect to the requirements of an employment contract of merchant seaman.

4. If it should be found that the contract petitioner made required the respondent to pay him a one hundred dollars bonus until he returned to New York, the further issue is presented as to whether such bonus should be paid during petitioner's internment on land and the applicability of Maritime War Emergency Board Decisions opposing such payment.

This latter question has been before the Courts on several occasions with varying results:

In *Agnew et al.* v. *American President Lines, Ltd.*, 1949 A. M. C. 1007, — F. (2d) — (C. A. 9th, May 5, 1949) and in *Steeves et al.* v. *American Mail Line, Ltd.*, 154 F. (2d) 24 (C. C. A. 9th, 1946) the Court held that ambiguities in a seaman's employment contract should be resolved in his favor; and that an ambiguously phrased promise to a seaman, that he would be paid war bonus in the event of internment, was to take precedence over contrary decisions of the Maritime War Emergency Board, or even a contrary

provision in an applicable collective bargaining agreement. See also *Elgin, J. & C. Ry Co.* v. *Burley et al.*, 325 U. S. 711, 744, 65 Sup. Ct. 1282, 1299 (1945).

On the other hand a contrary conclusion was reached in the instant case, and also in *Mason et al.* v. *The Texas Company*, 171 F. (2d) 559 (C. A. 1st, 1949).

Each of the cited cases required the Appellate Court to resolve the conflict between the original employment agreement as construed and the effect of the Maritime War Emergency Board Decisions. In the instant case some of the same issues are again present and should be resolved by this Honorable Court in view of the apparent conflict of opinion now current among the First, Second and Ninth Circuits.

V

For the reasons advanced in the brief supporting this application, your petitioner is advised and believes that the decision of the Court below (a) enunciates doctrine which appears to be in conflict with a decision of this Honorable Court, (*Scott* v. *McNeal*), (b) construes Decisions of the Maritime War Emergency Board with the effect of violating statutes enacted for the protection of merchant seamen (46 U. S. C. A. 564, 565, 600, 626, 627), (c) creates conflict of opinion among different Circuit Courts with respect to the payment of war bonus to seamen for the period that they were imprisoned in enemy territory.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

ROMAN MONTOYA, *Petitioner.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 226

ROMAN MONTOYA,

Petitioner,

vs.

TIDE WATER ASSOCIATED OIL COMPANY,

Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

I

Facts

Petitioner is a 55-year-old seaman, whose mother tongue was Spanish, and whose knowledge of English was limited (R. 40). The Court found this as a fact in its findings (R. 134). He had worked for respondent some 2 to 3 years prior to March 4, 1942, when he signed on the S.S. William F. Humphrey as a messman at the Port of New York (R. 31). Petitioner's monthly wages, as set forth in the shipping articles, were $87.50 per month, made up as follows: Basic monthly wage $70, temporary emergency increase wage $17.50 per month (R. 89).

It is not entirely clear whether petitioner was a member of any union at that time (R. 60-70), but at any rate, there was a collective bargaining agreement between the respondent and Tide Water Tankermen's Association, which

had been entered into on December 7, 1940, under which, as an incentive for remaining in continuous service with the company, respondent agreed to pay seamen employed on its vessels certain extra benefits. In this case, the extra benefits would be 10% of the basic monthly wages of $70, based on the seaman's service record (which benefit petitioner has received only until July 17, 1942, when he was captured), and one of the questions in this case is whether petitioner is entitled to that extra $7 per month, from the time of his capture, until his repatriation (R. 91, 92).

The same collective bargaining agreement also provided for vacation or vacation pay at the rate of 21 days for each year of service, and here, too, petitioner has received this benefit only until the date of capture; and one of the questions in the case is whether petitioner is entitled to vacation or vacation pay, to cover the period from the date of his capture until repatriation (R. 93).

The shipping articles called for return to a final port of discharge in the United States and they were signed in the following manner: The crew lined up outside the saloon, and each crew member was called in, one following behind the other (R. 34). Inside the saloon, the signing on was superintended by two of the ship's officers, and by the U. S. Shipping Commissioner (R. 35). The Shipping Commissioner, in the presence of these ship's officers, told petitioner the amount of his wages, and also that he would receive his wages, plus his $100 monthly bonus, until he would be returned to New York (R. 35-43). The Trial Court found this to be a fact in its findings (R. 134).

In signing the shipping articles, the front page was covered, and lying face downward on the table (R. 38). The only thing exposed to petitioner was that part of the articles containing the lines for the signature and addresses of the crew. The covered front page, lying face downward on the saloon table, was never shown to him (R. 38).

It so happens that the front page of the shipping articles (Plff.'s Ex. 1, R. 33) contained a rider, stating that certain specified Decisions of the Maritime War Emergency Board were to apply without however stating the text of the Decisions. However, petitioner was never told that he was bound by the Decisions of the Maritime War Emergency Board (R. 39), and he never even knew what they were (R. 40). The Trial Court found this to be a fact in its findings (R. 134).

The whole sign-on ceremony took about one minute (R. 43), and as soon as he finished signing the articles and was told about his wages and bonus, the petitioner was dismissed from the saloon, making room for the next crew member who followed (R. 80). There was no opportunity to read the front page (R. 58).

Thereafter, the ship sailed, and on July 16, 1942, she was attacked by a German raider (R. 45). Petitioner was taken as a prisoner of war and eventually, he was placed in a Japanese concentration camp (R. 46), on November 1, 1942, remaining there until he was liberated, about August 15, 1945. He was subsequently repatriated to the United States, and arrived back in New York on September 18, 1945 (R. 96).

Meanwhile, the Maritime War Emergency Board, pursuant to respondent's request of September 17, 1942 (Plff's Ex. 2, R. 51), had issued a certificate on November 19, 1942, declaring the petitioner presumptively dead,* (Deft's Ex. B, R. 87), and on December 4, 1942, defendant deposited with the United States Shipping Commissioner, in the port

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* Decision No. 5 of the Maritime War Emergency Board (Deft's Ex. D, R. 87), provides that in the event of the internment of any of the personnel of a vessel, where it is unknown if the crew member has lost his life, the shipowner (with the approval of the Maritime War Emergency Board) "shall have the option of declaring the seaman presumptively dead."

of New York, the sum of $1,248.07, made up as follows (R. 94, 95):

a) Earned base wages, emergency wage increases, additional service record compensation, plus war bonuses under Maritime War Emergency Board Decision No. 2, earned by petitioner up to and including July 16, 1942, when the vessel was lost due to enemy action, in the total sum of $862.32

b) Wage "benefits" under Maritime War Emergency Board decision No. 5, revised, from July 17, 1942 (date of capture) to November 19, 1942 (date of issuance of certificate of presumptive death), at $87.50 per month, in the total sum of $385.75.

On December 26, 1942, while the petitioner was a prisoner in the hands of the enemy, the Maritime War Emergency Board revised Decision No. 5, to provide that in the event of the death, or presumed death, of a seaman, the unallotted wages payable up to the date of destruction or abandonment of a vessel, shall be paid over by the operator to the Shipping Commissioner, in accordance with law (121; Deft's Ex. D, R. 87).

It will be noted that the money had been deposited with the Shipping Commissioner, even before the amendment to Maritime War Emergency Board Decision No. 5, above referred to, i. e., the money was deposited December 4, 1942, and the amendment occurred December 26, 1942.

At any rate, the Shipping Commissioner deposited the $1,247.07 with the United States District Court (S. D. N. Y.) and, about July 31, 1943, that amount was paid out by the Court, to the administrator of the petitioner's estate, who had meanwhile been appointed by a Louisiana Court (R. 95). The administrator paid this money out to the petitioner's next of kin, i. e., his nephew who was also a seaman, and who spent the money within the next two years (R. 49, 50).

When petitioner was subsequently repatriated, following his liberation, he had his said nephew come to see him, but was unable to obtain reimbursement (R. 50). Meanwhile, he had promptly demanded payment of this money from the respondent, and his demand had been refused (R. 47-49). The Trial Court so found (R. 129).

Following his liberation, the respondent did pay the petitioner his earned wages, at the rate of $87.50 monthly from November 19, 1942 (date of issuance of certificate of presumptive death) to September 18, 1945 (date of repatriation), plus certain bonuses to cover only the period while a prisoner of war on enemy vessels and while in transit during the course of repatriation, pursuant to Maritime War Emergency Board Decision No. 5, revised (R. 97, 98).

On October 3, 1945, the Maritime War Emergency Board issued an order, correcting the certificate of presumptive death, by deleting petitioner's name from the list of the missing crew members (Deft's Ex. C; R. 87).

Respondent has refused to pay petitioner (a) wage earnings equal to the $1,248.07, which had been deposited with the U. S. Shipping Commissioner and which eventually had been paid over to the administrator, and disposed of to the next of kin; (b) war bonus at $100 per month, from November 2, 1942 to September 7, 1945, while petitioner was a prisoner of war on land, or on land after liberation, awaiting repatriation, which sum would come to $3,400 (R. 104); (c) additional compensation for service from the date of capture on July 17, 1942, until repatriation on September 18, 1945, at 10% of the $70 monthly base pay rate (i. e., $7 per month), in the sum of $266 (R. 104); (d) vacation or vacation pay at 21 days per year for service for the same period, from July 17, 1942 to September 18, 1945, at the monthly base pay rate of $70 per month, plus $1.20 per day subsistence allowance, which vacation pay would come to $222.39 (R. 105).

II

Errors Relied On and Summary of Arguments Specified as Grounds of Appeal

1. The decision of the Court of Appeals for the Second Circuit in the instant case appears to be opposed to the decision of this Honorable Court in *Scott* v. *McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108 (1894).

2. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner could validly agree to waive his right to wages, in the event that he was declared presumptively dead, following the loss of the vessel, would appear to be in conflict with 46 U. S. C. A. 600.

3. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner was bound by shipping articles which did not set forth the text of the Maritime War Emergency Board Decisions referred to therein and which were not made known to him by the Shipping Commissioner, would appear to be in conflict with 46 U. S. C. A. 564, 565.

4. The decision of the Court of Appeals for the Second Circuit in the instant case that respondent had discharged its obligation to petitioner by depositing his earned wages in the sum of $1,248.07 with the Shipping Commissioner, in accordance with the provisions of 46 U. S. C. A. 626, 627 would appear to be a misconstruction of said statutes. Utilization of these provisions is not binding when, in fact, the seaman is alive.

5. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner was not entitled to a $100 monthly bonus during the period of his internment by the enemy, as he had been given to understand by the U. S. Shipping Commissioner, in the presence of the ship's officers, at the time he signed on, would appear to be in conflict with *Steeves et al.* v. *American Mail Line, Ltd.*,

9th Cir. 154 F. (2d) 24, and *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N. D. Cal. 1947) rev. (9th Cir. May 5, 1949) 1949 A. M. C. 1007, Cf. *Mason et al.* v. *The Texas Company* (1st Cir. 1949), 171 F. (2d) 559.

6. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner's period of "service" terminated with the destruction of the vessel, would appear to be an erroneous interpretation of the employment contract made by the petitioner.

III

The Payment to the Administrator Did Not Extinguish Respondent's Debt to Petitioner

In *Scott* v. *McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894), a plaintiff had disappeared under circumstances which justified his relatives in concluding that he had been murdered. He was subsequently declared dead by a probate court, based on a state statute which provided for a presumption of death where a person was absent for more than seven years. All of the requirements of the state law as to notice, publication, etc., were given, and an administrator was duly appointed. The administrator took over the plaintiff's property and sold it to the defendants in good faith. Subsequently, the plaintiff turned up, very much alive, and demanded the return of his property. The defendants argued that, the state statute having been fully complied with, and since they were entirely innocent in the matter, the lawfully appointed administrator had passed good title to them. The highest court of the state found for the defendants, but this was reversed by the United States Supreme Court, Mr. Justice Gray stating at page 1114:

> "The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

> The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.
>
> In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like Roderigas *v.* Institution, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced."

This *Scott* case has been cited with approval time and time again and it has represented firmly established law since at least 1894.

The respondent here claims that once the certificate of presumptive death was issued, it became incumbent upon it to deposit petitioner's wages in accordance with the statutory requirements applicable to a deceased seaman. But the respondent overlooks the fact that the statutes pertaining to

the disposition of wages of a deceased seaman have no application to this case, because the petitioner is not, in fact, a deceased seaman.

Further, a certificate of presumptive death could not have been issued had not the respondent itself "exercised its option" under Maritime War Emergency Board Decision No. 5 to have the petitioner declared presumptively dead.

The option was exercised for the respondent's benefit. Until the certificate was issued, respondent continued liable for the payment of base wages to the seaman until his repatriation.

Since petitioner's earned wages had been deposited on December 4, 1942, *i.e.*, previously, the Court of Appeals did not find it necessary to pass on the legality of the subsequent (December 26, 1942) Revision of Decision No. 5, which expressly provided for the disposition of wages due the seaman at the date of presumptive death.

At the time petitioner signed the articles, Decision No. 5 simply provided that a seaman might be declared presumptively dead. The Court below ruled that the subsequent Revision of December 26, 1942, merely made explicit the provisions of 46 U. S. C. A. 626, 627, and that the disposition of petitioner's wages in accordance with these statutes, exonerated the respondent. We respectfully submit that the Court was in error. We may reasonably assume that the Revision of Decision No. 5 on December 26 would not have been deemed necessary, unless some question had arisen as to what disposition should be made of the wages of a presumptively dead seaman. Presumably these wages could have been held for an indefinite period pending confirmation that the seaman was in fact dead. That the shipowner was given this discretion is indicated by the "option" given him to have the seamen declared dead. It was not mandatory that this be done. Nor was it mandatory, prior to December 26, 1942, that once a certificate of presumptive death did

issue, that the wages be distributed. The exercise of the "option" was largely in the shipowner's interest.

We know of no case which has held the distribution of a seaman's wages pursuant to 46 U. S. C. A. 626, 627 to be binding upon him because he was erroneously presumed to be dead.

In any event, petitioner was not bound by the Maritime War Emergency Board's Revision of Decision No. 5 on December 26, 1942, since it constituted a unilateral modification of petitioner's employment contract, long after his employment had commenced and after he had been taken as a prisoner of war.

Steeves et al. v. *American Mail Line, Ltd.* (9th Cir. 1946) 154 F. (2d) 24, 26;
Lynch v. *U. S.*, 292 U. S. 571, 54 S. Ct. 840 (1934);
Elgin, J. & E. Ry. Co. v. *Burley et al.*, 325 U. S. 711, 65 S. Ct., 1282 (1945);
Weber v. *The Supreme Tent, etc.*, 172 N. Y. 490 (1902);
Ayers v. *Grand Lodge of the Ancient Order, etc.*, 188 N. Y. 280 (1907).

IV

The Maritime War Emergency Board Was Not Set Up to Deprive Seamen of Their Wages, Nor Can Its Decisions Be Construed as Repealing Statutes Enacted for Their Protection.

The Maritime War Emergency Board came into being in 1941 because of the inability of shipowners and maritime labor unions to arrive at satisfactory bonus agreements due to the lack of current accurate information and because of the need for uniformity. It was a voluntary agreement among the parties. It was not the result of an Executive Order.[6]

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[6] See "Consolidated Legal Bulletin C-Merchant Seamen," pp. 59-61, published September 18, 1945 by General Counsel of the War Shipping Administration.

The Court below ruled that, under the shipping articles which he signed, petitioner agreed to be bound by the Decisions of the Maritime War Emergency Board. He was deemed, therefore, to have waived his right to wages when they were administratively distributed following the issuance of the certificate of his presumptive death. There is no Board Decision, however, which states specifically that a seaman is to be deprived of his wages where he is presumptively declared dead, and subsequently it turns out that he is alive.

What is more, the Court below overlooked a very important principle of law which applies to seamen's contracts, i. e., the principle that a seaman cannot give up any right to wages, or any remedy for the recovery of same, even by agreement; and that any such agreement, even if it were expressly stated in the articles (which here it is not), would be invalid. 46 U.S.C.A., Section 600 (R.S. Section 4536) explicitly states:

> "• • • every stipulation, by which any seaman consents to abandon his right to his wages in the case of the loss of the ship • • • shall be wholly inoperative."

For an analysis of the favored position of seamen's wages, see *Shilman* v. *U. S.*, 2nd Cir. 1947, 164 F. (2d) 649, cert. den., 333 U. S. 837, 68 S. Ct. 608 (1948).

Also, overlooked by the Court below were Sections 564 and 565 of Title 46 U.S.C.A. which prescribe that the shipping articles shall contain the employment agreement between the seaman and master, and that the Shipping Commissioner shall attach a certificate to the articles, confirming that each seaman has acknowledged that he has either read the articles or heard them read to him; that he was acquainted with its conditions, and understood same.

In our case, Mr. Montoya never knowingly consented, on signing the articles, that if he were to be taken as a prisoner

of war, and be presumptively declared dead, he would thereby lose his earned wages upon being subsequently found alive. On the contrary, he had every right to rely upon the Shipping Commissioner's statement, made in the presence of the ship's officers, at the time he was signed on, to the effect that his wages and bonus would be continued until he would be returned to the United States. And since the articles were signed during a period of war, it must be presumed that the parties had in mind the possibility that the vessel and its crew might be captured by the enemy and detained for a considerable period. The failure to insert the text of the Maritime War Emergency Board Decisions into the articles, and the failure to make petitioner aware of them, should be fatal to any contention that such Decisions delimited petitioner's rights as explained to him by the Shipping Commissioner in the presence of the officers, on which he had a right to rely fully.

Boulton et al. v. *Moore*, 14 Fed. 922, 926 (C.C. N.D. Ill. 1883);

McDonald et al. v. *U. S.* (2nd Cir. 1923), 292 Fed. 593, 594.

It may well be, as Judge Frank stated in his dissenting opinion that the failure to comply with the statutory requirements rendered the employment contract abortive and that petitioner should recover in *quantum meruit*. In any event, however, the Maritime War Emergency Board Decisions incorporated by reference in the shipping articles should not have been held binding upon the petitioner. To impose them upon the petitioner, as the Court below has ordered, is to disregard the statutory protection afforded seamen since 1872.[7]

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[7] That petitioner accepted certain benefits from the Maritime War Emergency Board does not require that he be bound by its Decisions. *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N. D. Cal.), rev. on other grounds (9th Cir., May 5, 1949), 1949 A.M.C. 1007.

V

Petitioner Was Entitled to Bonus While He Was Held as a Prisoner of War by the Enemy

The Court below refused to award the plaintiff bonus during the period of his internment because the Maritime War Emergency Board in Decision No. 5 had ruled that a seamen's war bonus should only be paid while he was at sea, or in transit to and from war zones.

This, however, completely overlooks the fact that the petitioner's claim for bonus does not rest upon the Decisions of the Maritime War Emergency Board. Petitioner's claim for $100 bonus, to cover the period of his internment, rests upon either *quantum meruit* under 46 U. S. C. § 575, or upon the Shipping Commissioner's statement to him, at the time of signing him on, in the presence of the ship's officers, to the effect that not only his wages, but also his bonus, would continue until such time as petitioner would be repatriated. The Court below, having found this to be the fact, it is difficult to understand why this promise should not be attributed to this respondent. The respondent, in directing that certain of its officers be present at the time the crew members were signed on, must be deemed to have done so with knowledge of the provisions of 46 U.S.C.A., Section 565, to the effect that the Shipping Commissioner must make the seamen acquainted with the conditions under which they were being employed. If the purport of the articles were not being properly represented by the Shipping Commissioner, then the respondent's officers, detailed to the particular task of superintending the sign-on, were under a duty to speak and straighten out the error, if there was any error.

It is reasonable to assume that the officers, as well as the petitioner, all understood that the seamen were being employed during a time of war, under articles recognizing that the vessel and its crew might be captured and in-

terned by the enemy, in which eventuality the wages and bonus were not to cease with the wreck or loss of the vessel, as provided under 46 U.S.C.A. 593, but that instead, the wages and bonus were to continue until such time as the respondent would eventually repatriate the crew.

That this was apparently the general understanding among seafaring men is borne out by the fact that several suits by seamen seeking bonus under such circumstances have been filed not only on the east coast, but also on the west coast.

Steeves et al. v. *American Mail Line, Ltd.* (9th Cir. 1946), 154 F. (2d) 24;

Mason et al. v. *The Texas Company* (1st Cir. 1949), 171 F. (2d) 559;

Agnew, Jr., et al., v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N.D. Cal.), rev. (9th Cir. May 5, 1949), 1949 A.M.C. 1007.

The Court below refused to award bonus during the period of internment, because under Article 2 of Decision No. 5 of the Maritime War Emergency Board, the ship-owner was held to assume liability during periods of internment, only for basic wages and emergency wages, and not for bonus (R. 116, 119). The text of this Decision, however, was, as we have seen, not annexed to the articles, and was never made known to the petitioner.

Moreover, Decision No. 5 was not intended to apply to specific shipping article agreements between seamen and shipowners, and the jurisdiction of the Maritime War Emergency Board was limited solely to differences between the ship-operator and maritime labor unions.

Steeves et al. v. *American Mail Line, Ltd.* (9th Cir. 1946), 154 F. (2d) 24, 26.

There would appear to be a conflict of opinion among the Circuits as to applicability of bonus agreements to periods of internment.

Cf. Steeves et al. v. *American Mail Line, Ltd., supra; Mason et al.* v. *The Texas Company* (1st Cir., 1949), 171 F. (2d) 559; and *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N.D. Cal.), rev. (9th Cir., May 5, 1949), 1949 A.M.C. 1007.

VI

The Petitioner Continued to Be the Respondent's Employee During the Period of His Internment, and he Was Therefore Entitled to the Extra Service Benefit and Vacation Pay During His Internment.

In "Consolidated Legal Bulletin-C-Merchant Seamen" (issued by the General Counsel of the War Shipping Administration on September 18, 1945), referred to above, the necessity for repatriating seamen, following the loss of their vessel, is dealt with commencing at page 77. The War Shipping Administration counsel points out at page 78 that ordinarily, under 46 U. S. C. 678-679, all of the owners' obligations to the mariners would be terminated on the wreck of the vessel, and that the seaman would be able to obtain repatriation, only if he were destitute. At page 80 he points out that, because of this, regulations were adopted so that "every seaman whose employment is terminated abroad by reason of a casualty occurring to his vessel, shall be repatriated to his port of shipment, and that wages, together with subsistence during transportation, shall be paid until the seaman arrives at the port of shipment."

It would seem, therefore, that the employment relationship continued, because respondent continued to pay the petitioner wages during the period of his internment, and

obligated itself to provide for his return transportation to the United States, in the event of and following just such a disaster as occurred herein.

The attorney for the respondent argued at the trial that a voyage automatically comes to an end, with the loss or wreck of a vessel, by statute; and the Court below adopted that view in reliance upon 46 U. S. C. 593, which only provides that the right to wages ceases with the wreck of a vessel. True, the voyage thus came to an end. However, there is a distinction between the voyage coming to an end and the employment relationship coming to an end.

Enochasson v. *Freeport Sulpher Co. et al.*, 7 F. (2d) 674, 675 (S. D. Texas, 1925);

Southern S. S. Co. v. *National Labor Relations Board, et al.*, 316 U. S. 31, 62 S. Ct. 886 (1942).

The fact that respondent chooses to call these payments "internment benefits," rather than "wages" (although they are in all respects equal to the exact wages fixed), and the fact that respondent may reimburse itself for this payment by insurance, is entirely immaterial. As the Court said in The Leonidas (4th Cir., 1940) 116 F. (2d) 440, 442:

> "There can be no question but that the so-called 'war bonus' was additional wages for extra-hazardous service. It was awarded as the result of a demand for increased wages, and was paid for services rendered and for nothing else. To call a portion of such wages a 'war bonus' does not alter its essential character. LaJuett v. Coty Mach. Co., 153 Misc. 410, 275 N. Y. S. 882; 5 Words and Phrases, Permanent Edition, 670."

See also *Venides* v. *United Greek Shipowners Corp.*, 168 Fed. 2nd 681 (2nd Cir., 1948).

Conclusion

A writ of certiorari should issue to the Court of Appeals for the Second Circuit so that a decision may be obtained on the several questions raised by this appeal. Their determination will be of grave importance in Maritime Law since they affect the basic rights of merchant seamen.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 226

ROMAN MONTOYA, PETITIONER

v.

TIDE WATER ASSOCIATED OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 36-41) is reported at 79 F. Supp. 677; the opinion of the Court of Appeals for the Second Circuit (R. 53-60) is reported at 174 F. 2d 607.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered May 5, 1949 (R. 61). The petition for a writ of certiorari was filed on

August 2, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a seaman interned by the enemy after his ship was sunk is entitled under his particular contract of employment (1) to a war bonus during the period of his internment, (2) to have his period of internment count as service with the company for the purpose of receiving various benefits under a collective bargaining agreement, and (3) to require his employer, who under a decision of the Maritime War Emergency Board paid the Shipping Commissioner (for distribution to his heirs) the wages and other compensation due him to the time of the declaration of his presumptive death, to make payment of such wages and benefits again to him.

STATEMENT

Petitioner was employed as a seaman on the *SS William F. Humphrey,* a vessel owned and operated by the Tide Water Associated Oil Company.[1] On December 7, 1940, that company entered into a collective bargaining agreement with the Tide Water Tanker Men's Association (hereafter referred to as the "Union") certified by the National Labor Relations Board as the collective bargaining representative of all unlicensed personnel on re-

[1] The vessel was time-chartered to the United States, which is under an obligation to reimburse the Tide Water Associated Oil Company for any claims arising out of the sinking of the vessel by enemy action on July 16, 1942. It is for this reason that the Solicitor General appears for the respondent.

spondent's ocean-going tankers. (R. 30-31.) This agreement, among other things, established the wages to be paid and provided additional compensation and vacation pay based on length of service (R. 31).[2] Subsequent to the execution of this agreement, because of the increased hazards resulting from World War II, supplementary agreements were entered into providing "emergency increase wages" in addition to the "basic wage" set out in the agreement. (Exhibits Z-S-3, S-4, S-5 attached to the Stipulation of Facts.)

Upon our entrance into the war in December 1941, a Maritime War Emergency Board (hereafter referred to as the "Board") was established pursuant to a "Statement of Principles" signed by unions and operators in the Merchant Marine (46 C.F.R., 1943 Supp., p. 2124) to fix uniform conditions for the entire industry with respect to war risk bonuses and insurance and to replace the existing collective bargaining machinery in that regard.[3] One of the signatories to this statement

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[2] By stipulation between the parties the exhibits introduced into the record have not been printed (R. 50-51). The collective bargaining agreement is annexed as Exhibit X-S1 to the Stipulation of Facts entered into between the parties (R. 34).

[3] "Before the Statement of Principles was signed, war risk bonuses and insurance were the subject of collective bargaining between individual ship operators and unions. There were two controlling reasons why the maritime industry agreed to substitute a board in the place of a course of individual bargaining: first, inability to bargain intelligently for the want of adequate information with regard to the extent of war risks; and second, the desire for a uniform system of war risk insurance and bonus instead of a system built upon piecemeal

was John F. Collins, who had signed the collective bargaining agreement on behalf of the Union and consistently represented it in its dealings with the respondent as its "Advisor." (D's Ex. A, Exhibits attached to Stipulation of Facts.) The Board[4] immediately promulgated comprehensive "Decisions," establishing for the entire industry uniform conditions in the areas of employment affected by the risks of war.

Ordinarily, by statute the right of any seaman to wages terminates with the loss of his ship (R. S. 4526, 46 U. S. C. 593). To replace this harsh rule with one giving greater protection to seamen whose vessel was sunk as a result of enemy action, the Board promulgated Decision No. 5 (dated February 21, 1942) which provided that, in the event of the destruction of the vessel, the operator would continue liable for "basic wages and emergency wages." These wages, where the seaman had made no allotment and had no resident dependents, were to be deposited in trust for him. To prevent such payments being made in perpetuity, however, where the man had gone down with his ship, the operator

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negotiation whereby one man's life might be insured for $2,000 and another man's for $5,000, or whereby vessels of two ship operators making identical voyages at the same time might pay different bonus for the same risk." (Statement issued June 21, 1944, by the Maritime War Emergency Board, 1944 A.M.C. 1020, 1022).

[4] The personnel appointed by President Roosevelt were: Dr. John R. Steelman (Department of Labor); Capt. Edward Macauley, chairman (Maritime Commission), and Dr. Frank P. Graham (President of the University of North Carolina). 3 C.F.R., Cum. Supp., 1327.

was given the option, where it was unknown whether or not the seaman had lost his life in the destruction of the vessels, of having the seaman declared presumptively dead and of paying his death benefits, and any other monies due him, to the Shipping Commissioner, thereby ending the obligation to continue making payments in trust. (D's Ex. D; R. 29.)

Another Decision of the Board, Decision No. 2 (dated January 10, 1942), established the bonus payments to be made for voyages in particular areas because of the extra hazardous conditions caused by the war. The amount of such bonuses varied with the area traversed. From time to time the Board would alter both the amount and areas depending on the fortunes of war. Thus, in 1944, while a 100 percent bonus was payable on most voyages, only 40 per cent was paid for those made along the West Coast of the Americas. 1944 A.M.C. 1020, 1022.

On March 4, 1942, petitioner, who had been for some time in the employ of respondent, signed on the *William F. Humphrey* as messman. According to the shipping articles he was to be paid a basic monthly wage of $70 and a temporary emergency increase wage of $17.50 per month. (R. 30.) Further implementing the provisions of the then collective bargaining agreement with petitioner's Union, a rider to these shipping articles, attached to the first page, provided that the decisions of the Maritime War Emergency Board, which were

available for inspection at the office of the Shipping Commissioner, were to be applicable to the voyage (Pl's Ex. 1).

According to petitioner's testimony, when he was called into the saloon of the ship to sign the articles, the first page was lying face downwards on the table (R. 13). The Shipping Commissioner for the port, who by statute is required to be present when shipping articles are signed (R. S. 4512, 46 U. S. C. 565), told him, petitioner testified, "you get $100 on your bonus, you get paid until you going back in New York" (R. 15, 45). Petitioner's ability to read English is limited and, he testified, no one told him that he was bound by the decisions of the Board (R. 45).

The *William F. Humphrey* was lost by enemy action on July 16, 1942, and after a period as a prisoner aboard a German vessel, petitioner was turned over to the Japanese on November 1, 1942 and by them interned on land until his liberation on August 15, 1945 (R. 31-32, 42). He was repatriated to the United States and arrived at New York on September 18, 1945 (R. 32).

During petitioner's absence, on November 19, 1942, at the request of respondent, the Maritime War Emergency Board issued a certificate of presumptive death covering a number of the members of the crew of the *William F. Humphrey,* including petitioner, who were presumed to have been lost with the vessel (Pl's Ex. 2; D's Ex. B). There-

after, the respondent paid over to the Shipping Commissioner at New York $1,248.07, which was the amount due petitioner as wages and bonuses under the shipping articles and Decisions 2 and 5 of the Board, as of the date of the issuance of the certificate of presumptive death. Of this sum, $358.75 represented wage benefits payable under Decision No. 5 from the date of the loss of the vessel to November 19, 1942; the balance consisted of the wages and bonus payments due him under Decision No. 2 before the ship was sunk. (R. 32, 42-43.) This money was subsequently paid over to plaintiff's estate and distributed to his heirs (R. 17, 21, 43).

Upon his liberation from the Japanese internment camp, petitioner requested respondent to pay him the wages and other benefits due him for the period of his absence. Thereupon, as required by the decisions of the Maritime War Emergency Board, he was paid (1) his basic and emergency wages for the period from the date of the issuance of the certificate of his presumptive death (November 19, 1942) to the date of his return to the United States on September 18, 1945, totalling $3,357.07, (2) a war bonus, calculated at $100 per month, for the three and a half months he had been held on a German vessel, and (3) various other bonuses covering the period of his repatriation. (R. 33, 43.)

Petitioner further demanded, but was not given, (1) the amount due him as wages and benefits prior to the date of the issuance of the certificate of pre-

sumptive death which had been paid to the Shipping Commissioner; (2) war bonus payments of $100 a month during his internment on land; and (3) additional pay and vacation pay, as provided for in the collective bargaining agreement on the basis of service, assuming the time he had spent in enemy hands to be service for the company (R. 33, 43-44).

This action was brought for these various sums. After a full trial, the district court concluded that no additional compensation was due petitioner (R. 47). It held that petitioner was bound by the Maritime War Emergency Board decisions which had been incorporated in the shipping articles, and that under them he had received everything to which he was entitled (R. 38-41, 45-47). The court found "nothing in the record raising an inference of fraud or imposition upon the plaintiff in signing the articles which would release him therefrom," and noted that he had accepted payment under the provisions of the rider which incorporated the decisions of the Board into the contract (R. 38).

On appeal, the court of appeals, one judge dissenting, affirmed the decision of the district court (R. 61). The court found the shipping articles, as signed, were controlling, and under these, petitioner had been fully paid. The statement of the Shipping Commissioner that petitioner would receive a one hundred dollar bonus until his return to New York the court considered no part of the

employment contract, even "on the assumption that contemporaneous parole statements could be shown to modify the written instrument" (R. 56). The dissenting judge was of the opinion that because of the statement of the Shipping Commissioner at the time the articles were signed, the articles did not bind petitioner, and no contract resulted from his signing them, and consequently he would be entitled to recover in *quantum meruit.* (R. 58). In this view of the case the dissenting judge thought petitioner to have "no claim to a contractual bonus", but equally not "bound by the provisions * * * relating to his presumptive death" (R. 60).

ARGUMENT

This case raises no question of general importance. The issue is whether, under the particular conditions surrounding the employment of petitioner as a seaman aboard respondent's vessel, he is entitled to certain additional wages and benefits. The circumstances are unique and involve no principle of general application. The two courts below were clearly correct in their analysis of petitioner's contractual rights. But even assuming the contrary, petitioner has been paid far more than he would be entitled to under the view most favorable to him taken by the dissenting judge below, and cannot recover more than he has already received.

1. At the outset, petitioner is faced with a dilemma from which there is no escape. If the deci-

sions of the Maritime War Emergency Board do not control his employment, his right to any compensation terminated, by statute, with the loss of his ship.[5] *supra,* p. 4. Were that so, he would not only have no right to the amounts he claims in this action, except possibly to the nine hundred dollars earned prior to the loss of the ship,[6] but he also would not be entitled to the nearly four thousand dollars he has already received, pursuant to the decisions of the Board, as wages and other benefits for his period of captivity. If, on the other hand, the decisions of the Board do govern his employment, as the courts below have held, then he has already received everything to which he is entitled.

a. Whatever view is taken of the facts as to the incorporation of the Board's decisions in petitioner's contract, there is no escape from this dilemma. Petitioner has contended in both courts below, as

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[5] "In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period. Such seaman shall be considered as a destitute seaman and shall be treated and transported to port of shipment as provided in sections 678 and 679 of this title. * * *" R. S. 4526, 46 U. S. C. 593.

[6] Except for less than nine hundred dollars in wages and bonuses earned by petitioner prior to the loss of his ship in July 1942, this action concerns only various benefits claimed to be due for the period subsequent thereto, while he was in enemy hands. This includes the $358.75 paid the Shipping Commissioner on his behalf for benefits subsequent to the loss of the vessel, the war bonuses, the increments for service and the vacation pay to which petitioner claims to be entitled for the period of his internment on land by the Japanese. *Supra,* pp. 7-8.

he does here, that because of the circumstances surrounding the signing of the shipping articles—his limited ability to read English, the fact that the rider making the Board's decisions applicable was not exposed, the statement by the Shipping Commissioner to him at that time—he is not bound by the incorporation into the articles of the decisions of the Board. But even if his contention were sustained, he would not thereby establish his right to the approximately ten thousand dollars which he seeks in this action; he would merely prove that he had no right to the four thousand dollars he has already received pursuant to the decisions of the Board.

To recover the sum he claims, petitioner must, therefore, do more than establish that he is not bound by the decisions of the Board. In the light of the statute specifically providing for the termination of the obligation to pay wages upon the loss of a vessel, he must establish some independent contractual right to compensation subsequent to the sinking of his ship. To supply this independent right, petitioner both here and in the courts below has attempted to argue that the original contract—based on the collective bargaining agreement unaffected by the Board's decisions—continued to exist, but modified to his further advantage by the statement made to him by the Shipping Commissioner as to bonuses and the duration of his pay. *Supra*, p. 6.

Several infirmities infect this argument. *First,* the Shipping Commissioner is not an agent of the employer but an independent government official holding a statutory office under legislation designed for the protection of seamen. *Young* v. *Steamship Co.,* 105 U. S. 41; R. S. 4501, 4502, 46 U. S. C. (1940 ed.) 541, 542. As the court below pointed out, there is no evidence that the Shipping Commissioner's statement was even heard, much less agreed to, by respondent's representatives (R. 56). It is elementary, therefore, his actions being neither authorized nor ratified, that he could not impose a contractual obligation on respondent different from that which respondent had offered to assume. At best, as the dissenting judge below suggests (R. 58), he could prevent any contract from coming into effect. Williston, *Contracts* (Rev. Ed.), § 95A (p. 306); *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *United States* v. *Johnson,* 160 F. 2d 789 (C. A. 9), reversed on other grounds, 333 U. S. 46. *Second,* the words of the Shipping Commissioner will not bear the weight petitioner seeks to put on them. In the language of the opinion below, "the proof was short and a finding to support appellant's position is nonexistent" (R. 56). It is probable that the Shipping Commissioner intended only to advise petitioner that because of the area into which the ship was going, which was not ordinarily divulged for wartime security reasons, a bonus would be payable for the entire voyage in contradistinction

to other voyages in less dangerous areas, where, under Decision No. 2 of the Board, a bonus was only payable for a portion of the voyage. *Supra,* p. 5.

It follows that the evidence upon which petitioner relies, viewed most sympathetically to him, as it was in the dissenting opinion below, does no more than prevent the shipping articles from constituting his contract of employment, leaving him to his rights in *quantum meruit.* It does not create a new and different contract conferring the rights he asserts.

b. If petitioner is relegated to his rights in *quantum meruit,* he clearly has no claim to any compensation subsequent to the loss of the vessel, since his right to such compensation, absent any special agreement, is cut off by statute. Consequently, he would have no right even to the four thousand dollars paid him on his return for his period of internment and repatriation, and, clearly, can claim no more. The only question which could remain in the case would be his right to so much of the wages and bonuses—something less than nine hundred dollars—which the Shipping Commissioner paid on his behalf upon issuance of the certificate of his presumptive death as having accrued prior to the loss of the vessel. See fn. 6, *supra,* p. 10. This is so since, if petitioner was not bound by the shipping articles, he did not consent, as the dissenting judge below pointed out (R. 60), to the payment of this money to anyone other than himself. As-

suming, however, that respondent was under a duty to pay petitioner upon his return the nine hundred dollars earned prior to the loss of the vessel, the four thousand dollars actually paid petitioner to which he had no claim, would more than cancel out this obligation.

2. Although we have so far discussed the case from the viewpoint most favorable to petitioner, the facts will not support that viewpoint. Both courts below have so found. Both have held that under the particular facts of this case, the shipping articles, which incorporated the decisions of the Maritime War Emergency Board, constituted the contract between the parties. Under the Board's decisions, petitioner has received everything to which he is entitled. The only compensation which they require to continue to be paid after the loss of a ship are the basic and emergency wages, and these petitioner has received. He cannot stretch this language to embrace vacation and service pay. His right to these special benefits terminated with the loss of his vessel. Moreover, the collective bargaining contract which created these special benefits was executed long prior to our entry into the war when internment could scarcely have been within the contemplation of the parties. The decisions of the Board are equally decisive as to the lack of merit of petitioner's claim for bonus payments during internment. *Mason* v. *Texas Co.*, 171 F. 2d 559 (C. A. 1), certiorari denied, 337 U. S. 915.

Cf. *Steeves* v. *American Mail Line,* 154 F. 2d 24 (C. A. 9).[7]

Petitioner, on the lower court's findings, is also precluded by the shipping articles which he signed, from attacking the payments made by the Shipping Commissioner, upon the issuance of the certificate of his presumptive death; the decisions of the Board, incorporated into the articles, specifically provide that this may be done. The suggestion that such agreement conflicts with the statutory provisions against any stipulation by which a seaman "consents to abandon his right to his wages in the case of the loss of the ship" (R. S. 4535, 46 U. S. C. 600) is insubstantial in the extreme (Pet. 5, 8, 16, 21-22). Petitioner did not abandon his right to wages—in fact he has been paid a substantial amount as wages since his return—he merely agreed that, in certain circumstances, his wages might be paid to another on his behalf. Since the payments made by the Shipping Commissioner were pursuant to that agreement, there can be no question of due process, and *Scott* v. *McNeal,* 154 U. S. 34, 46, 50-1, is inapposite. Moreover, as to at least that part of this amount which was paid for the period subsequent to the loss of the ship, petitioner's only right thereto flowed from the Board's Decision No. 5. It is clear that the right could be no broader than the contractual grant which spe-

[7] Petitioner does not claim that the Board's decisions contemplated bonus payments for periods of internment (Pet. 23-4).

cifically provided for payment to the Shipping Commissioner where it was uncertain whether the seaman had survived the ship.

In any view of the case, therefore, petitioner's claims cannot prevail, and raise at best mixed questions of law and fact whose resolution is of little general concern.

CONCLUSION

Since the decision below is clearly correct and involves no question of general importance, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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